



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 13, 2003

Mr. S. Anthony Safi
Mounce, Green, Myers, Safi & Galatzan
P.O. Box 1977
El Paso, Texas 79950-1977

OR2003-0848A

Dear Mr. Safi:

This office issued Open Records Letter No. 2003-0848 (2003) on February 7, 2003. We have examined that ruling and determined that we made a factual error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on February 7, 2003. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act).

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179577.

The El Paso Independent School District (the "district"), which you represent, received a request for one hundred and fifty-three categories of information relating to a specific construction project. You claim that certain requested information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Because you seek to withhold only some of the requested information, we assume you have released the remaining responsive information. If you have not released the rest of the responsive information, you must immediately release such information to the requestor. *See* Gov't Code §§ 552.006, .301(a), .302. With regard to the information that you seek to withhold, we have considered the exceptions you claim and reviewed the submitted information.

Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). You state that the submitted information pertains to the ranking “of architectural firms that are being considered to be retained by the [district] as the architectural firm for a construction project” You further state that an architect for this project has not been selected, and you explain that release of ranking information at this time would have specific adverse consequences for the district, such as attempted withdrawal from the procurement process by some of the competing firms, more difficulty in negotiations with the selected firm or firms, and giving an advantage to a higher ranked firm in finalizing the procurement process. Based upon your representations, we find that you have established the applicability of section 552.104 to most of the submitted information. Accordingly, you may withhold this information, which we have marked pursuant to section 552.104. The remaining document does not contain ranking information, and you have not otherwise demonstrated how releasing this document will harm the district’s interests. Thus, the district may not withhold the remaining document under section 552.104.

Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. You state, and we find upon review, that the remaining document consists of an intraagency communication containing opinions, advice, and preliminary recommendations on the composition of the “Statement of Qualifications Review” and the “Interview Committee.” Accordingly, we find that you may withhold the remaining document, which we have marked, under section 552.111 of the Government Code.

In summary, you may withhold the information we have marked under section 552.104. You may withhold the remaining document, which we have marked, pursuant to section 552.111.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

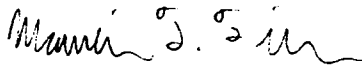
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Maverick F. Fisher".

Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 179577

Enc: Submitted documents

c: Mr. J. Eduardo Cadena
Cadena & Phillips, P.C.
1017 Montana Avenue
El Paso, Texas 79902-5411
(w/o enclosures)